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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 469

VANCOUVER STEAMSHIP COMPANY, INC.,
PETITIONER,

vs.

THERESA RICE, ADMINISTRATRIX OF THE ESTATE OF VINCENT CATINO, DECEASED.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF RESPONDENT.

ARTHUR I. MOULTON,
WM. P. LORD,
Counsel for Respondent.

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BRIEF OF RESPONDENT.

Statement.

Libelant's intestate, Vincent Catino, was a longshoreman by occupation, and on December 1, 1929, Catino was in the employ of the Astoria Stevedoring Company and was working for that company in load-

ing the S. S. "City of Vancouver," a vessel of British registry. This vessel was berthed at the lumber dock at Westport and lying in navigable waters of the Columbia River. This company had a contract for the loading of the ship, and particularly agreed to stow the cargo in the cargo spaces of the vessel through the services of longshoremen in its employ. It was agreed between the owners of the ship and the stevedoring company that the owners would furnish the loading machinery and maintain it in seaworthy condition and maintain it in such condition during the loading. In other words, for the purposes of this case, it may be assumed that there was an independent contract between the parties.

It is charged in Article II of the Libel that "Vincent Catino, libelant's intestate, was engaged in his said work in loading said steamship and was standing on the deck of said steamship near a hatch, and a sling load of lumber was being hoisted from said dock over the deck of said steamship, and while said load was being so hoisted and was over the deck of said steamship, the winch carrying said load suddenly lost its purchasing power, and said load fell toward the deck, striking libelant's intestate, and so crushing him that he was mortally injured, while engaged in said employment, and while said vessel was lying in the waters of the Columbia River, and thereupon the said sling load of cargo was removed from the body of said Vincent Catino and at said time said Vincent Catino was bleeding internally, and was so unconscious from said injury that he did not know or comprehend the nature of any act, and thereupon said Vincent Catino

was placed on a stretcher and removed to an emergency hospital in the village of Westport or thereabouts, and one hour thereafter, without regaining the possession of his faculties, said Vincent Catino expired."

The particular negligence charged was that a wedge or key which held the winch in gear was old and rusty and as a result would not hold. It was the duty of the owners, acting through the officers and crew, to maintain the key in a seaworthy condition, and by reason of the defect the winch came out of gear while hoisting a load over the deck. Libelant, who is the appointed administratrix of the estate of the deceased, brought this proceeding to recover damages in the sum of $10,000.00 for the death of the deceased.

It is further alleged that libelant elected to sue the third party liable in accordance with the right of election provided for in the Longshoremen's and Harbor Workers' Compensation Act.

The Vancouver Steamship Company, Ltd., a Canadian corporation, filed exceptions on the ground that the libel did not state a cause of suit in admiralty, and these exceptions were sustained by the court, and judgment of dismissal was entered upon libelant's refusal to plead further.

The trial court sustained exceptions to the libel following the decision of the Kaian Maru, 2 Fed. (2d) 121, a case holding that a claim of this character could not be maintained in admiralty and a case which was not argued before the trial judge on the part of the libelant. The case was appealed to the Circuit Court

of Appeals and the decree was reversed by that court holding:

> "In considering the jurisdiction of a court of admiralty under the circumstances it should be remembered that neither at common law nor by the general maritime law was there a right to recover for death (citing cases), and that admiralty courts having jurisdiction of cases resulting in death have adopted the more humane course of following the law of states, or nations, permitting such recovery where applicable. There seems to be no good reason why in admiralty there should be a jurisdictional distinction between the two types of statutes permitting recovery for death where the injury from which the death results occurs on board ship and within admiralty jurisdiction. Statutes of states and nations providing such a remedy have been applied by courts of admiralty in the interests of humanity. If this is the true basis for admiralty jurisdiction, there is no broad ground for making the distinction between the two types of statutes in question. The circumstances are identical in each case. It is true that in determining questions of jurisdiction fine distinctions are very often made and are frequently determinative of the question, but there seems to be no good reason for such a distinction here, particularly as the law applicable aboard ship where the injury occurs is the same as that ashore where the injured man died."

Points and Authorities.

I.

An admiralty court will enforce against a vessel a lien for wrongful death created by a State statute.

The Anglo-Patagonian (C. C. A.), 235 Fed. 92, cert. denied 242 U. S. 637.

II.

If the fatal force to the deceased occurred on navigable waters and death occurred on shore, admiralty has jurisdiction.

Smith & Sons v. *Taylor,* 276 U. S. 179.

The Chiswick (C. C. A.), 231 Fed. 452.

The Samnanger, 298 Fed. 620.

Campbell v. *Luckenbach S. S. Co.,* 5 F. (2d) 674.

Liverani v. *Jno. T. Clark & Sons,* 176 N. Y. S. 725.

U. S. S. B. E. F. Corp. v. *Greenwald* (C. C. A.), 16 Fed. (2d) 948.

In Re Clyde S. S. Co., 16 Fed. (2d) 930.

Resigno v. *F. Jarka Co.,* 162 N. E. 16.

35 *Yale Law Journal,* 404, also at page 1007.

The Anglo-Patagonian (C. C. A.), 235 Fed. 92, 242 U. S. 637 (cert. denied).

Petition Clyde S. S. Co., 16 Fed. (2d) 930.

U. S. S. B. E. F. C. v. *Greenwald,* 16 Fed. (2d) 948.

III.

Oregon statutes create a liability in favor of the personal representative for wrongful death.

Sec. 5-703, O. C. A.

Sec. 51-601, O. C. A.

IV.

Furthermore, the Oregon statutes give a lien.

Sec. 51-601, Oregon Code Annotated.

Oregon Laws, 1911, Chapter 100, page 145.

The Corsair, 145 U. S. 335, 36 L. Ed. 727.

The Alaska, 225 Fed. 645.

V.

The striking of the deceased by a sling-load being hoisted by the winch was an act of the ship within the meaning of the statute.

Cordrey v. *The Bee,* 102 Or. 636, 201 Pac. 202.

The Bee (D. C.), 216 Fed. 709.

VI.

It has been frequently contended that where a person is injured in one State by negligence and dies in another State, an action for his death may be maintained in the courts of the former State under the death act thereof, since the cause of action given by that act is for the tort producing death and not for the death resulting therefrom.

Van Doren v. *Penn. R. Co.,* 93 Fed. 260.

9 Neg. & Comp. Cases, Annotated, 765.

ARGUMENT.

The issue framed in this case squarely presents the question whether a cause of suit to recover damages can be maintained in admiralty for wrongful death of a human being caused by a negligent act on shipboard, or more accurately stated by the failure to maintain the vessel in a seaworthy condition, resulting in death on shore, and this appeal involves this single question. It is admitted here that the deceased came to his death by a force or impact applied to his body while he was on a ship lying in navigable waters, and from that force he began bleeding internally, and before he was taken from the ship he had lost consciousness, and that he died one hour after the injury in an emergency hospital on shore.

It was held in *The Harrisburg*, 119 U. S. 199, that the absence of a Congressional Act or a State statute creating a right of action for wrongful death, a suit in admiralty could not be maintained to recover damages for the death of a human being caused by negligence, and all subsequent decisions have affirmed this statement of the law.

But in the State of Oregon, where this accident occurred, there is a death statute, as follows:

> "SEC. 5-703. *Death from Injury, When Representatives May Sue—Statute of Limitations—Amount of Recovery.*—When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action at law therefor against the latter, if the former might have

> maintained an action, had he lived, against the latter, for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and damages therein shall not exceed $10,000, and the amount recovered, if any, shall be administered as other personal property of the deceased person."

Section 51-601 O. C. A. provides that every boat used in navigating the waters of this State shall be liable to a lien for damages done by such boat resulting in the death of any person. The entire statute is set out in Article IV of the Libel. It is contended by respondent, by virtue of these sections, that admiralty will enforce the lien given by the State statute for the death of the deceased. That Section 51-601 gave a lien against the vessel for wrongful death was decided in several cases:

The Oregon, 45 Fed. 62.
The Alaska, 225 Fed. (D. C.) 645.

In the latter case practically all the decisions construing the boat lien acts are discussed.

The Act was amended in 1911 to remove any doubt that its purpose was to create a lien for wrongful death, and the following was added to subdivision 4, "and for damages or injuries by such boat or vessel resulting in the death of any person."

This Court recognized that this statute did give a lien and that it was enforceable in admiralty. See *The Corsair*, 145 U. S. 335, 36 L. Ed. 727.

So it can be seen that the Oregon statutes have taken care of the inadequacy of a remedy in admiralty to re-

cover damages for wrongful death. But counsel says this cause of action is not for the original injury to the deceased received on shipboard, but the death which occurred on land that is provided for by the Oregon death statutes, and any claim that his personal representative has for the wrongful death is a non-maritime tort.

We have two answers to this contention. First, Section 51-601 O. C. A. merely gives a lien in the nature of an attachment and no reason exists why, if the cause of action alleged is non-maritime, a Federal court should not enforce the lien. See *Rounds* v. *Cloverport Foundry & Machinery Co.*, 237 U. S. 303. It makes no difference whether the tort was maritime or non-maritime. Admiralty will take the lien statute and enforce it in its court.

Second, the wrong causing the death of Catino occurred on the ship, and nothing took place on land that added one iota to what had taken place. As far as Catino was concerned, death had commenced from the moment that the load struck him, and taking him ashore to ameliorate his condition could not in reason mean that a new intervening cause had taken place which would give rise to new and different rights. The fatal impact had taken place and to contend that his personal representative had no rights to recover damages against this foreign vessel against whom no process could be secured in a common law action because he happened to expire on land, is depriving injured parties of all remedies against foreign owned vessels and giving such owners an advantage over

local owners which should not be tolerated. Such refinement of distinctions bring the law into disrepute and leave parties without remedy, if tolerated.

The rule supported by the weight of authorities is that the admiralty courts will enforce against a vessel a lien for wrongful death created by State statute if the fatal force was applied to the body of the deceased in navigable waters, although death from that fatal force happens on land and follows the rule adopted by the State courts that where one is injured in a State and moves to another State where death results from the original injury, an action may be maintained in the State where the wrong occurred producing his injury.

In the case of the *Anglo-Patagonian* (C. C. A.), 235 Fed. 92, certiorari denied 242 U. S. 637, a ship repairer was injured on shipboard and was taken ashore where he died from his injuries. A similar statute to the Oregon Act quoted was in effect in the State and the proceeding in admiralty was brought to recover damages for his wrongful death, and the court held that a proceeding in admiralty would lie to enforce the lien.

The court said:

> "Nor, as regards admiralty jurisdiction, can the cases of the workmen who were injured be distinguished from the case of the workman who was killed. The circumstance that Byrd was taken in an unconscious condition, and therefore without his knowledge or assent, from the dry dock, where he was hurt, to a nearby hospital, where he died shortly afterwards, cannot serve to defeat the jurisdiction which, as we hold, would have attached if his death had

occurred at the scene of the accident. On this question we follow with approval the decision of the Fifth Circuit Court of Appeals in *The Gye Case*, 207 Fed. 247, 124 C. C. A. 517, in which it is said:

'We deem it unnecessary in view of the conclusion reached on the merits to advert to the question of jurisdiction, more than to say that it is well settled by the weight of modern authority that the *locus injuriæ* is the test of jurisdiction. *The Strabo*, 98 Fed. 988 (39 C. C. A. 375); *The Aurora*, (D. C.) 163 Fed. 634.'

"In the Code of Virginia (section 2902) it is provided that 'The person who, or corporation or ship or vessel which, would have been liable if death had not ensued, shall be liable to an action for damages, or, if a ship or vessel, to a libel *in rem*'; and this court held in *The Glendale*, 81 Fed. 633, 26 C. C. A. 500, that the lien created by this local statute was enforceable in a federal court of admiralty. To the same effect, and also holding that injury to a stevedore, employed in discharging cargo, occasioned by a defective appliance furnished by the ship, constitutes a maritime tort, is the recent case of *The Chiswick*, 231 Fed. 452 (C. C. A.). In the light of the authorities cited, and others of a similar import, we think it clear that the plea of want of jurisdiction was rightly overruled."

In *Smith & Son* v. *Taylor*, 276 U. S. 179, a stevedoring company was unloading a vessel at a dock. Taylor, a longshoreman, was killed while employed on the wharf and was standing on a stage appurtenant to the dock and was struck by a sling load of cargo which was being lowered for him to receive, and which swung

over and struck him and knocked him off of the stage, and he was drowned. In an action to recover damages for his death, it was contended that the case fell within the maritime jurisdiction. It was admitted that the stage was an extension of the land, but it was admitted that the state law would apply if he had been killed by falling on the landing place, but it was contended that there was no claim made for injuries sustained while deceased was on land, and as the suit was only for death that occurred in the river, the case is exclusively within the admiralty jurisdiction:

> "Plaintiff in error concedes that the stage and wharf on which deceased was working are to be deemed an extension of the land (citing cases) and that the state law would apply if he had been injured or killed by falling on the landing place. It argues that as no claim was made for injuries sustained while deceased was on land and as the suit was solely for death that occurred in the river, the case is exclusively within the admiralty jurisdiction. But this is a partial view that cannot be sustained. The blow by the sling was what gave rise to the cause of action. It was given and took effect while deceased was upon the land. It was the sole, immediate and proximate cause of his death (citing cases). The substance and consummation of the occurrence which gave rise to the cause of action took place on land" (citing cases).

The contention that death on shore resulting from negligence on shipboard has its foundation in certain distinctions sought to be made by Mr. Hughes in his

work on Admiralty—a hornbook series—found in the second edition at page 235. Professors Macgruder and Grout, in an article in the February issue of the *Yale Law Journal* at page 395 of Vol. 35 of the *Journal*, in a carefully prepared text and note, reject the contention. The authors there say, at page 404:

> "Even though a particular state death act is admittedly applicable to the wrongful death, the *locus* of the injury must be examined to determine whether an action on such statute may be maintained in admiralty. As has been shown above, the 'wrongful act' for which the next of kin are afforded a right of action is the application of fatal force to the body of the victim. Therefore, if the fatal force is applied to the victim on land, the admiralty has no jurisdiction even though such force is put in motion by an initial act of negligence on navigable waters. Thus, if a hoisting derrick negligently operated on ship-board should let loose a bale of cotton which falls and kills a person standing on the wharf, the admiralty would have no jurisdiction. Conversely, if the fatal force is applied to the body of deceased on navigable waters, the admiralty would have jurisdiction, although the chain of causation was initiated by a negligent act on shore.
>
> "Likewise, if the fatal force is applied to the body of the deceased on navigable waters, the admiralty has jurisdiction even though the death occurs on shore. A learned writer has contended the contrary on the theory that 'the gist of the injury' to the next of kin is the death, and that if that death occurs on shore it is not a maritime tort; and there are a few decisions in

the district courts to this effect. But an impressive preponderance of authority, with the better reason, it is submitted, supports the admiralty jurisdiction in such a case. This view is supported also, by the numerous cases of fatal accidents on interstate railroads, where the courts have regularly decided that the applicable death act is that of the state wherein the accident occurred, rather than that of the state wherein the victim happened to die."

And in a note the learned authors say:

"In many cases where the fatal injury occurred on the water, the court neglected to state whether the ensuing death occurred on land or on water, evidently regarding this fact as not significant. *State of Maryland* v. *Hamburg American Steam Packet Co.* (1911, D. C. Md.), 190 Fed. 240; *Young* v. *Clyde Steamship Co.*, 294 Fed. 549. See *Souden* v. *Fore River Shipbuilding Co.* (1916), 223 Mass. 509, 112 N. E. 82; *The Schooner Robert Lewers Co.* v. *Kekauoha*, 114 Fed. 849. * * *

"* * * It is submitted, however, that the place where the victim happens to die is without significance in applying this distinction between the death acts and the survival acts. *Needham* v. *Grand Trunk R. R.* (1865), 38 Vt. 294; *Rudiger* v. *Chicago, St. Paul R. R.* (1896), 94 Wis. 191, 68 N. W. 661; *Louisville & Nashville R. R.* v. *Williams* (1896), 113 Ala. 402, 21 So. 938; *Van Doren* v. *Pennsylvania R. R.* (1899, C. C. A., 3d), 93 Fed. 260; *Alaska Commercial Co.* v. *Williams* (1904, C. C. A., 9th), 128 Fed. 362; *De Harn* v. *Mexican Nat. Ry.* (1893), 86 Tex. 68, 23 S. W. 381. See *Slater* v. *Mexican Nat. Ry.* (1904), 194 U. S. 120."

The death statute of the District of Columbia is a counterpart of the Oregon statute. A seaman died at sea from improper food. An action was brought under this statute for his wrongful death which occurred in South Africa, and it was contended that the laws of this country did not give a right to a cause of action for wrongful death, and in applying the law of the flag of the vessel's registry, the Circuit Court of Appeals held that the fact of death is not the tort but its consequence, and the cause of action arose from the injury resulting in death and that death did not constitute the tort. See *U. S. S. B. E. F. Corp.* v. *Greenwold* (C. C. A.), 16 Fed. (2d) 948. In other words, the tort which produces death gives rise to the cause of action and the death is the damage.

In a note to recent cases in commenting on *Pickles* v. *F. Leyland & Co.* (D. C.), 10 F. (2d) 371, holding in favor of appellee's contention, the editors point out that *Campbell* v. *Luckenbach S. S. Co.*, 5 F. (2d) 674, overruled the *Kaian Maru* case, saying:

> "When the negligence which causes an accident resulting in death or injury occurs in one state or country and the accident itself in another, the law of the latter place governs (citing cases). * * * And so where death is the only operative fact occurring within a state the wrongful death statute of that state does not impose responsibility (citing cases). * * * And if the fatal force is applied to the body of the deceased on navigable waters, admiralty has jurisdiction even though the death occurs on shore. *The Chiswick*, 231 Fed. 452; *Liverani* v. *John T. Clark & Son*, 176 N. Y. S. 725; *The*

Samnanger, 298 Fed. 620; *The Anglo Patagonian*, 235 Fed. 92; *Campbell* v. *Luckenbach S. S. Co.*, 5 F. (2d) 874. However, a few cases, including the instant decision, have held that if the death occurs on land admiralty has no jurisdiction. *The Kaian Maru*, 2 F. (2d) 121 (apparently overruled though not cited by the decision in *Campbell* v. *Luckenbach S. S. Co.*, *supra*); *Ryley* v. *Philadelphia & R. Ry. Co.*, 173 Fed. 839. This minority doctrine is based upon an interpretation of the Federal Death Act which makes the *death* the wrongful act for which the action is given on the theory that the statute is not a *survival* statute, but a *death statute*. *Hughes, Death Actions in Admiralty* (2d Ed. 1920), 236. But what seems to be the better view is that the application of fatal force to the body of the victim should be the gist of the action. Under this view the Federal Death Act would apply when death occurs on land from an injury at sea" (page 1007).

In *Resiano* v. *F. Jarka Co.*, 162 N. E. 13, at 16, it was held:

> "Since the wrong was done upon the waters, the circumstance is unimportant that the death which followed was upon the land."

This case was reversed on certiorari, but on entirely unrelated grounds. (See 75 L. Ed. 182.)

The construction sought to be imposed is not in harmony with the weight of authority, and is a distinction which, if applied, will deprive citizens of this country of any remedy for the wrongful acts of vessels having the privileges of our ports over those of the owners of our own merchant marine who can be held in a common law action for our local courts, and the distinction

sought to be made is too fanciful to be applied in modern day jurisprudence.

It is a matter of common knowledge that certain foreign nations which maintain large competitive merchant fleets buy up, at a fraction of their cost, vessels which have been out-serviced and condemned by other nations, and carry on an active trade with such vessels with the United States. These vessels come into ports with their gear deteriorated from age and use and unsafe to perform the services for which it was intended. The *Kaian Maru* relied on by respondent is an illustration where a man came to an untimely death by the using of "shot" ship's gear. And as long as the Government does not subject foreign owned vessels to inspection, as to their seaworthiness, as other countries do, just such accidents as happened to Catino can be expected, and to permit such vessels to evade liability on mere technical grounds is depriving the citizens of this country of their lives and property without due process of law. Until the decision of this Court in *Cunard Steamship Co.* v. *Mellon*, 262 U. S. 100, was handed down, many courts were disposed to apply the law of the flag with too much consideration to secure exact justice to its citizens and resident aliens. (See *Uravic* v. *Jarka Company*, 282 U. S. 234.)

Respectfully submitted,

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